No. _____

IN THE
Supreme Court of the United States

RON NEAL,
Superintendent, Indiana State Prison,
Petitioner,

v.

FREDRICK MICHAEL BAER
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE

QUESTION PRESENTED

During the closing arguments of Fredrick Michael Baer's double-murder trial, the prosecutor argued that Baer's rough upbringing did not diminish the enormity of his crime: the brutal murder of a young mother and her four-year-old daughter. The prosecutor made the point by informing the jury of his own tough childhood and observing that, although his mother was a prostitute who succumbed to a drug overdose, he still became a county prosecutor.

The Seventh Circuit seized on this remark and granted Baer habeas relief, concluding that Baer received constitutionally inadequate assistance under *Strickland v. Washington*, 466 U.S. 668 (1984), because his counsel did not allege prosecutorial misconduct or challenge certain jury instructions. It held that the Indiana Supreme Court, which had specifically rejected both of these claims, unreasonably applied *Strickland*.

The question presented is:

Did the Seventh Circuit violate the deferential review requirements of the Antiterrorism and Effective Death Penalty Act by disregarding the reasoned decision of the Indiana Supreme Court denying Baer's *Strickland* claims?

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The State of Indiana, on behalf of Ron Neal, Superintendent of Indiana State Prison, respectfully petitions the Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit (App. 1a–40a) is reported at *Baer v. Neal*, 879 F.3d 769 (7th Cir. 2018). The Order of the United States Court of Appeals for the Seventh Circuit denying the State's petition for rehearing and rehearing en banc (App. 41a–42a) is not reported. The order of the United States District Court for the Southern District of Indiana denying Baer a certificate of appealability (App. 43a–46a) is not reported but can be found at *Baer v. Wilson*, No. 1:11-CV-01168-SEB-TAB, 2015 WL 13688051 (S.D. Ind. Dec. 22, 2015). The order of the United States District Court for the Southern District of Indiana denying Baer's petition for a writ of habeas corpus (App. 47a–107a) is not reported but can be found at *Baer v. Wilson*, No. 1:11-CV-1168-SEB-TAB, 2014 WL 7272772 (S.D. Ind. Dec. 18, 2014). The Indiana Supreme Court's decision upholding the denial of Baer's petition for post-conviction relief (App. 108a–159a) is available at *Baer v. State*, 942 N.E.2d 80 (Ind. 2011). The Indiana Supreme Court's decision affirming Baer's conviction (App. 160a–188a) is available at *Baer v. State*, 866 N.E.2d 752 (Ind. 2007).

JURISDICTION

A panel of the Seventh Circuit Court of Appeals entered judgment on January 11, 2018. *Baer v. Neal*, App. 1a. The Court of Appeals denied the State's petition for rehearing and rehearing en banc on April 4, 2018. App. 41a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 2254, as amended by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), provides in relevant part:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

STATEMENT OF THE CASE

1. The events leading to the murder of Cory and Jenna Clark began the morning of February 25, 2004. Trial Tr. 1217–19. Baer arrived to work, a roadside construction project in a small town in central Indiana, at around 9:00 that morning; a short time later he left the worksite and drove to a nearby home. *Id.* at 1226, 1239–40. He knocked on the front door and asked the woman who answered if he could use her phone to call his boss. *Id.* at 1182. She agreed, and Baer pretended to make a call, dialing the numbers "666." *Id.* at 1182–1184. Shortly after Baer returned the phone, the woman's dog walked onto the porch. *Id.* at 1182. Frightened, Baer left the house. *Id.* at 1421.

Driving further down the road, Baer saw Cory Clark taking her trash to the curb. *Id.* at 1209–1212, 1877. He parked his car and knocked on her door. *Id.* at 1209–1212, 1877. Jenna, Cory's four-year-old daughter, answered first, but Cory soon came to the doorway to see her visitor. *Id.* at 1877–1880. As before, Baer asked if he could borrow a phone. *Id.* at 1877. Cory obliged, handing him her phone and withdrawing into her residence. *Id.* at 1877–1880. As the court-appointed psychologist—to whom Baer described the details of the killings—recounted at trial, Baer stayed on the porch, considering whether to rape Cory. *Id.* at 1878.

The decision did not take long. Baer walked into Cory's home, where he saw Cory partially undressed. *Id.* at 1879–80. Cory turned around, saw Baer, and began to scream. *Id.* In response, Baer pulled his knife, took Cory by the head, and, commanding her to shut up, forced her into her bedroom. *Id.* Meanwhile,

Jenna came down the hall looking for her mother. *Id.* But Baer blocked the door and demanded Cory tell Jenna to go to her room; Cory complied. *Id.* at 1881. Jenna continued to push on the door, however, while Cory struggled with Baer in the bedroom. *Id.* at 1883. Baer eventually overpowered Cory and cut her underwear off. He then decided Cory might have a venereal disease, so he forced her into a kneeling position and slit the young mother's throat. *Id.* at 1882–83.

After Baer killed Cory, Jenna managed to open the bedroom door. *Id.* Screaming at the sight of her mother's murdered body, Jenna fled for the false safety of her bedroom. *Id.* at 1883–84. But Baer soon caught Jenna: He sliced the four-year-old's throat, nearly decapitating her. *Id.* at 1175, 1673–75, 1677, 1883.

Baer then left the scene, taking some money and a few "souvenirs" from the house before returning to his shift at the construction site. *Id.* at 1125, 1154–56, 1170, 1374–75, 1392, 1453, 1885. He was arrested the following day. *Id.* at 1404, 1414–15. Baer told police that he deserved the death penalty for his crimes. *Id.* at 1423, 1445. The toxicology screens taken upon his arrest showed negative results, but Baer claimed that he used methamphetamine on the day of the murders. *Id.* at 1635, 1640–46.

2. The State charged Baer with multiple crimes, including attempted rape and two counts of murder. *Baer v. State* (*Baer I*), App. 161a. The State requested a death sentence based on five charged aggravating factors: the murder of a child under age twelve, murder after committing another murder, murder during

attempted rape, murder during robbery, and murder while on probation. *Id.*

At trial, the defense did not argue that Baer was innocent, but contended only that he was guilty but mentally ill (GBMI). *Baer v. State (Baer II)*, App. 110a–111a. The jury disagreed and found Baer guilty, *simpliciter*, of the two murders, as well as robbery, theft, and attempted rape. *Id.* at 111a. During the penalty phase, the State proved all five aggravating factors and the jury found that these outweighed any mitigating circumstances. *Id.* Accordingly, the jury recommended, and the Court imposed, the death penalty. *Id.*

Baer filed a direct appeal to the Indiana Supreme Court that raised several issues, including prosecutorial misconduct, but the Court rejected those claims, unanimously affirming his convictions and death sentence. *Baer I*, App. 187a. Baer then filed a petition for a writ of certiorari, which this Court denied. *Baer v. Indiana*, 522 U.S. 1313 (2008).

3. Shortly after this Court ended his direct appeal, Baer filed for state post-conviction relief, alleging, among many other things, that his trial and appellate counsel rendered unconstitutionally ineffective assistance under *Strickland v. Washington*, 466 U.S. 668, 687 (1984), for failing to object to jury instructions and for failing to object to alleged prosecutorial misconduct. *Baer II*, App. 113a, 130a, 135a

Baer's jury-instruction claim contended that his counsel was constitutionally ineffective because he failed to challenge two penalty-phase jury instructions addressing intoxication. The first instruction at

issue omitted the last three words of a provision of Indiana Code section 35-50-2-9(c)(6), which provides that a jury considering the death sentence may consider "[t]he defendant's capacity to appreciate the criminality of the defendant's conduct or to conform that conduct to the requirements of law was substantially impaired as a result of mental disease or defect *or of intoxication*." *Id.* at 130a (quoting Ind. Code § 35–50–2–9(c)(6)) (alteration in original; emphasis added). The second instruction told the jury that voluntary intoxication could not be considered "when determining whether Baer had the mental state required for conviction." *Id.* at 130a.

Baer's prosecutorial-misconduct claim alleged multiple infractions that his counsel failed to challenge, including: (1) the prosecutor's conflation during *voir dire* of a GBMI verdict and a verdict of Not Responsible by Reason of Insanity (NRI); (2) the prosecutor's observation during *voir dire* that the Indiana legislature might one day change the law on life-without-parole sentences to permit parole notwithstanding such a sentence; (3) the prosecutor's claim during trial that Indiana law was unclear whether a GBMI verdict could support a death sentence; (4) the prosecutor's references to victim impact statements during *voire dire* and at trial; and (5) the prosecutor's use of personal opinions and facts not in evidence, such as "the hardships [the prosecutor] himself faced while growing up" (*e.g.*, that the prosecutor's mother was a prostitute). *Id.* at 135a–142a.

The state trial court rejected all of Baer's claims, including his jury-instruction and prosecutorial-misconduct claims. *Id.* at 113a. The Indiana Supreme

Court issued a thorough and reasoned opinion affirming the denial of Baer's claims. *Id.* at 108a–159a.

Regarding Baer's jury-instruction claim, the Indiana Supreme Court first noted that Indiana law authorizes post-conviction relief for an ineffective-assistance claim based on a failure to object to jury instructions only if the trial court "was compelled as a matter of law to sustain his objections." *Id.* at 129a (citing *Lambert v. State*, 743 N.E.2d 719 (Ind. 2001)). It held that Baer could not meet this standard: The first instruction's removal of the "or of intoxication" language was lawful "because the evidence showed that Baer was not intoxicated at the time of the offense," and the second instruction correctly stated that voluntary intoxication could not be considered for the purpose of "determining whether *Baer committed his crimes intentionally*." *Id.* at 130a (emphasis in original). Beyond the lawfulness of these two instructions, other instructions told the "jurors they could consider any . . . circumstances in mitigation and that there are no limits on what factors an individual juror may find as mitigating." *Id.* (ellipsis in original; internal brackets, quotation marks, and citations omitted). Baer's jury-instruction claim therefore failed; any objection "would have been overruled at trial." *Id.*

With respect to Baer's prosecutorial-misconduct claim, the Indiana Supreme Court held that it was reasonable for Baer's counsel not to object to some of the prosecutor's comments—namely, conflating GBMI and NRI verdicts and offering victim impact evidence—"as part of their general strategy of letting the prosecutor discredit himself." *Id.* at 136a, 140a. It also held that other alleged instances of misconduct

were not misconduct at all: The prosecutor's comments regarding possible legislative changes to life-without-parole sentences, his comments questioning the capacity of a GBMI verdict to support a death sentence, and his statements of personal opinion were all acceptable because they were made in response to arguments first made by Baer's counsel. *Id.* at 136a–140a.

Finally, as an additional, independently sufficient reason to deny Baer's prosecutorial-misconduct claim, the Indiana Supreme Court held: "To the extent that any comments directed at Baer, his counsel, or his experts were misconduct, any impact on the fairness of Baer's trial was minimal. Even if taken in the aggregate, these comments did not affect the outcome of Baer's trial." *Id.* at 142a.

4. After failing to obtain relief in state court, Baer filed a petition for a writ of habeas corpus in the United States District Court for the Southern District of Indiana. *Baer v. Wilson*, App. 47a. The district court denied Baer's petition because "the Indiana Supreme Court's decisions did not embody an unreasonable application of clearly established federal law." *Id.* at 106a. In addition, the district court observed that Baer "failed to show that he was prejudiced by the performance of his trial or appellate counsel in any respect." *Id.* (internal quotation marks omitted). A year later, the district court reaffirmed its decision by denying Baer's petition for a certificate of appealability, stating that "[r]easonable jurists could not debate whether Baer's petition should have been resolved in a different manner." *Baer v. Wilson*, App. 46a.

Baer appealed, and the Seventh Circuit, repudiating all of the previous rulings in the case, granted habeas relief. *Baer v. Neal (Baer III)*, App. 1a. Amidst the myriad claims Baer raised in his fourteen years of proceedings, the Seventh Circuit identified two arguments it deemed winners: that Baer's counsel provided constitutionally ineffective assistance with respect to both the jury instructions and alleged prosecutorial misconduct outlined above. *Id.* at 14a, 22a. It reached this conclusion despite recognizing that these claims "were adjudicated on the merits by the Indiana Supreme Court," *id.* at 10a, and that AEDPA precludes relief unless the Indiana Supreme Court's "application of the *Strickland* standard was unreasonable," *id.* at 11a (quoting *Harrington v. Richter*, 562 U.S. 86, 101 (2011)).

First, the Seventh Circuit held that (1) the two intoxication-related jury instructions were unconstitutional because they "precluded" the jury from considering Baer's alleged intoxication as a mitigating circumstance, such that (2) counsel's failure to object constituted ineffective assistance, and (3) the Indiana Supreme Court unreasonably concluded otherwise. *Id.* at 13a (quoting *Lockett v. Ohio*, 438 U.S. 586, 604 (1978)).

Second, it faulted Baer's counsel for failing to object to three categories of alleged prosecutorial misconduct, including the prosecutor's (1) conflation of GBMI and NRI verdicts, (2) presentation of victim impact evidence, and (3) invocation of personal opinions and facts not in evidence (including the prosecutor's own rough upbringing). *Baer III*, App. 24a–36a. And again, the Seventh Circuit deemed unreasonable the

Indiana Supreme Court's application of *Strickland* to those supposed lapses, both because counsel's actions did not (in its view) reflect a reasonable strategy and because the Indiana Supreme Court supposedly did not consider the "aggregate" of the prejudice against Baer. *Id.* at 36a. Ultimately, the Seventh Circuit found it "reasonably likely" that without the prosecutor's actions—and defense counsel's decision not to object to them—"the jurors would not have recommended death." *Id.* at 39a.

REASONS TO GRANT THE PETITION

Certiorari is warranted because the decision below flatly ignores the Court's precedents sharply circumscribing the scope of federal habeas review permitted by AEDPA. AEDPA permits relief only "where there is no possibility fairminded jurists could disagree that the state court's decision conflicts with th[e Supreme] Court's precedents. It goes no farther." *Harrington v. Richter*, 562 U.S. 86, 102, (2011). Yet here the Seventh Circuit set aside a state capital conviction based on its essentially *de novo* review of *Strickland* claims. Its "perfunctory statement at the end of its analysis asserting that the state court's decision was unreasonable" is insufficient to overcome the stringent limitations on federal habeas relief imposed by AEDPA. *Sexton v. Beadreaux*, 138 S.Ct. 2555, 2560 (2018) (per curiam).

The Indiana Supreme Court issued a searching and reasoned decision that, where applicable, faithfully applied federal law. AEDPA prohibits federal courts from second-guessing this decision. "This Court has repeatedly admonished" federal courts to abide by AEDPA and the Court's precedents." *Sexton*,

138 S.Ct. at 2558, 2560 (quoting *Harrington*, 562 U.S. at 102). Unfortunately, in this case it needs to do so once again.

I. The Seventh Circuit Failed to Defer to the Indiana Supreme Court's Rejection of Baer's Jury-Instruction Claim

To support a claim that defense counsel provided ineffective assistance by failing to object to jury instructions, the instructions themselves must be unlawful. *See, e.g., Benefiel v. Davis*, 357 F.3d 655, 663 (7th Cir. 2004). Lawfulness of jury instructions is generally a state-law matter immune from habeas review. *See Waddington v. Sarausad*, 555 U.S. 179, 192 n.5 (2009) (explaining that the state court "expressly held that the jury instruction correctly set forth state law, and we have repeatedly held that it is not the province of a federal habeas court to reexamine state-court determinations on state-law questions." (internal citations and quotation marks omitted)).

The Seventh Circuit, however, identified a single federal-law problem with Baer's jury instructions, *i.e.*, that they violated the constitutional rule, articulated in *Lockett v. Ohio*, that jurors in a capital case cannot "be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record . . . ." *Baer III*, App. 13a (quoting *Lockett v. Ohio*, 438 U.S. 586, 608 (1978)).

The Seventh Circuit's decision is wrong on both Indiana law and federal law. Its reasoning cannot withstand scrutiny and certainly cannot show that this conclusion is sufficiently obvious to grant relief under AEDPA. The Indiana Supreme Court correctly held

that the jury instructions did *not* preclude the jury from considering all mitigating circumstances. The Seventh Circuit violated AEDPA in overturning this holding.

A. Baer's jury instructions did not preclude the jury from considering mitigating circumstances

The standard used to "assess whether jury instructions satisfy the rule of *Lockett*" is "'whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence.'" *Johnson v. Texas*, 509 U.S. 350, 367 (1993) (quoting *Boyde v. California*, 494 U.S. 370, 380 (1990)). This is necessarily a general standard, and "[t]he more general the rule . . . the more leeway [state] courts have." *Sexton v. Beadreaux*, 138 S.Ct. 2555, 2560 (2018) (alterations and ellipsis in original) (quoting *Renico v. Lett*, 559 U.S. 766, 776 (2010)). The Seventh Circuit failed to show that the Indiana Supreme Court misapplied this standard.

Here, the trial court *twice* told the jury that they were free to consider any factor in mitigation: The trial court instructed jurors to consider "[a]ny other circumstances[,] which includes the defendant's age, character, education, environment, mental state, life and background[,] or any aspect of the offense itself and his involvement in it which any individual juror believes makes him less deserving of the punishment of death." Trial Tr. 2570. Shortly thereafter, it reiterated that "there are no limits on what factors an individual juror may find as mitigating." *Id.* at 2572. These instructions easily satisfy *Lockett*.

The two aspects of the penalty-phase instructions to which Baer now objects do not change this conclusion. The trial court omitted the phrase "or of intoxication" from a list of specific items the jury could consider in mitigation, but this meant only that the jury was not *specifically* informed that intoxication could be considered as a mitigating factor; it did not *exclude* intoxication from consideration. And with respect to the other instruction to which Baer now objects, the trial court's exclusion of voluntary intoxication from consideration *for the purpose of determining the necessary mental state for conviction* was, as the Seventh Circuit acknowledged, "a correct statement of the law." *Baer III*, App. 17a. This instruction "related only to proof of aggravating factors," *id.*, two of which—murder during attempted rape and murder during robbery—required the jury to determine Baer's mental state.

Taken together, the penalty-phase jury instructions more clearly authorize consideration of mitigating circumstances than other instructions the Court has approved in the far less deferential direct-appeal context. In *Boyde v. California*, for example, the Court considered an instruction authorizing the jury to consider—in addition to ten factors relating to the charged offense and prior criminal activity—"any other circumstance which extenuates the gravity of the crime." 494 U.S. at 374 (internal brackets omitted). The defendant argued that, in the context of the preceding ten factors, this instruction suggested that jurors could consider in mitigation only factors related to the charged offense. But the Court held that there was "not a reasonable likelihood that [the] ju-

rors interpreted the trial court's instructions to prevent consideration of mitigating evidence of background and character." *Id.* at 381. Similarly, *Johnson v. Texas* held that an instruction directing the jury "to decide whether there was 'a probability that petitioner would commit criminal acts of violence that would constitute a continuing threat to society'" sufficed to inform the jury that it could consider the defendant's youth as a mitigating factor. 509 U.S. 350, 368 (1993) (internal brackets and citation omitted).

Notably, the Court upheld the instructions in *Boyde* and *Johnson* even though the instructions did not *specifically* tell jurors they could consider the mitigating evidence the defendant adduced. Here, the trial court gave not one, but two separate instructions informing jurors that they could consider *any* factor in mitigation. The Indiana Supreme Court correctly held that these instructions were constitutional. And because they were constitutional, Baer's counsel did not act unreasonably in failing to object to them.

B. The Seventh Circuit violated AEDPA by overturning the Indiana Supreme Court's holding that Baer's counsel reasonably chose not to object to the jury instructions

In order to grant Baer habeas relief on his jury-instruction claim, the Seventh Circuit had to show (1) that the jury instructions were unconstitutional, (2) that Baer's counsel acted unreasonably in choosing not to object to these instructions—that is that the instructions' unconstitutionality was so obvious that the counsel's failure to object fell outside the wide range of reasonable professional assistance—and (3)

that this unconstitutional ineffectiveness was inconvertible such that the Indiana Supreme Court unreasonably applied *Strickland* in holding otherwise. *See Brown v. Payton*, 544 U.S. 133, 146–47 (2005) ("[I]t was not unreasonable to find that the jurors did not likely believe [the Defendant's] mitigation evidence beyond their reach."). It did not come close to making this showing.

The Seventh Circuit suggested that "the 'any other circumstance' and 'no limits' instructions contradicted the instruction excluding voluntary intoxication evidence," *Baer III*, App. 19a. (internal brackets omitted), but this is patently wrong. The "voluntary intoxication" instruction correctly explained that Indiana law does not permit consideration of voluntary intoxication for the purpose of determining the *mental state required for the aggravating factors*. *Baer II*, App. 129a–131a. This instruction did not mention mitigating circumstances, and it is therefore entirely consistent with the instructions telling the jurors that they could consider *any* factor in mitigation.

Moreover, the Seventh Circuit's lone citation supporting its conclusion, *Francis v. Franklin*, 471 U.S. 307, 322 (1985), is inapposite. *Francis* bars fixing a "constitutionally infirm" instruction with a contradictory curative one. *Id.* But in Baer's case, the "voluntary intoxication" instruction was not "infirm." It was, rather, a correct statement of the law. And the instructions were not contradictory, but instead informed different aspects of the jury's deliberations.

The Seventh Circuit failed to show that "there is no possibility fairminded jurists" could agree with the

Indiana Supreme Court's holding. *Harrington v. Richter*, 562 U.S. 86, 102, (2011). It merely disagreed with the Indiana Supreme Court's authoritative interpretation of Indiana law and the weight it gave to the broad "any circumstances" and "no limits" instructions. The Seventh Circuit summarily concluded that it "was unreasonable for the state court to conclude" that the instructions were constitutional. *Baer III,* App. 20a. Under the AEDPA/*Strickland* framework, this reasoning cannot justify habeas relief.

II. The Seventh Circuit Failed to Defer to the Indiana Supreme Court's Reasoned Rejection of Baer's Prosecutorial-Misconduct Claim

The Seventh Circuit's analysis of Baer's prosecutorial-misconduct claim was equally dismissive of the Indiana Supreme Court's reasoning. The Indiana Supreme Court denied Baer's prosecutorial-misconduct claim because he failed to show that his counsel acted unreasonably in deciding not to object to the alleged misconduct and because he failed to show that any such decision was prejudicial. The Seventh Circuit rejected this conclusion with respect to three categories of comments: the prosecutor's conflation of GBMI and NRI verdicts, his presentation of victim-impact evidence, and his introduction of personal opinions and facts not in evidence. *Baer III*, App. 22a–36a. In doing so, it "essentially evaluated the merits *de novo*, only tacking on a perfunctory statement at the end of its analysis asserting that the state court's decision was unreasonable." *Sexton v. Beaudreaux*, 138 S. Ct. 2555, 2560 (2018). The Seventh Circuit's decision therefore violates AEDPA.

A. It was reasonable for the Indiana Supreme Court to hold that Baer's counsel had a sound strategy for declining to object to the alleged misconduct

The Indiana Supreme Court began its discussion of Baer's prosecutorial-misconduct claim by undertaking what even the Seventh Circuit acknowledged was "a lengthy analysis" of each of the comments that allegedly were improper. *Baer III*, App. 37a. The Indiana Supreme Court determined that it was not unreasonable for Baer's counsel to decline to object to these comments, reasoning that many of the comments were not misconduct and that it was a sound strategy to not object to the statements that were improper. *Baer II*, App. 134a–142a.

Specifically, it held that one of the categories of comments to which the Seventh Circuit objected, statements of personal opinions and facts not in evidence, were not misconduct at all because Baer's defense counsel initially introduced the topics on which the prosecutor opined. *Id.* And with respect to the other two categories of comments that received the Seventh Circuit's disapproval, it held that it was reasonable for Baer's counsel to seek to discredit the prosecutor by (1) allowing him to erroneously conflate GBMI with NRI and (2) letting him be reprimanded for offering victim-impact evidence. *Id.*

The Seventh Circuit accorded no deference to this reasoning. It *conceded* that "the defense counsel cracked open the door to [the] subjects" about which the prosecutor offered opinions and discussed facts not in evidence. *Baer III*, App. 35a. Its only justification for finding that the statements were nevertheless

improper was its unsupported conclusion that the comments "were all not hard blows, but beyond the pale foul ones." *Id.* at 36a. This falls far short of showing that the Indiana Supreme Court's decision constitutes "an unreasonable application of . . . clearly established Federal law." 28 U.S.C. § 2254(d).

Indeed, within the limits set by the federal Constitution, the propriety of prosecutorial comments is a *state-law* question. *See Jones v. Gibson*, 206 F.3d 946, 959 (10th Cir. 2000) (finding "the prosecutor's questions and comments were improper under state law," but holding that "[f]ederal habeas relief [was] not available" because the prosecutor's conduct did not violate the federal Constitution). And the Seventh Circuit did not even attempt to demonstrate that the prosecutor's comments violated Baer's federal constitutional right to a fair trial, which would have required showing that the comments "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Darden v. Wainwright*, 477 U.S. 168, 181 (1986) (internal quotation marks and citation omitted). The Seventh Circuit's decision thus exceeded the scope of its authority, for "it is not the province of a federal habeas court to reexamine state-court determinations on state-law questions." *Estelle v. McGuire*, 502 U.S. 62, 63 (1991); *see also Wilson v. Corcoran*, 562 U.S. 1, 1–5 (2010) (summarily reversing the Seventh Circuit's grant of habeas relief because it "granted the writ to respondent without finding . . . a violation [of federal law]," explaining that "it is only noncompliance with *federal* law that renders a State's criminal judgment susceptible to collateral attack in the federal courts").

The Seventh Circuit's grounds for rejecting the Indiana Supreme Court's holdings regarding the prosecutor's conflation of GBMI with NRI and his introduction of victim-impact evidence were similarly insufficient. It found that the defense counsel's plan not to object to the GBMI/NRI conflation—a strategy counsel personally endorsed at the post-conviction relief hearing, *Baer II*, App. 136a—could not "be considered 'strategic'" because the trial court never corrected the prosecutor's statements, *Baer III*, App. 27a, although defense counsel repeatedly did so. And it found that the trial court's demand that the prosecutor "clean up [his victim-impact statements] and say I misspoke," Trial Tr. 803, did not justify counsel's strategy, presumably because the rebuke was made at the bench, *Baer III*, App. 28a–32a.

These conclusory, second-guessing rationales fail to abide by *Strickland*'s "require[ment] that every effort be made to eliminate the distorting effects of hindsight . . . [and] indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland v. Washington*, 466 U.S. 668, 689 (1984). They certainly do not comply with the "doubly deferential" standard of review required by AEDPA. *Knowles v. Mirzayance*, 556 U.S. 111, 123 (2009)).

B. It was reasonable for the Indiana Supreme Court to hold that Baer was not prejudiced by his counsel's failure to object to the alleged misconduct

Finally, even beyond its unlawful rejection of the Indiana Supreme Court's deficient-performance holding, the Seventh Circuit failed entirely to make the

showing necessary to overturn the additional, independently sufficient reason the Indiana Supreme Court gave for denying Baer's prosecutorial-misconduct claim: After pointing out that no particular failure to object was prejudicial, *Baer II*, App. 134a–142a, the Indiana Supreme Court held that "[e]ven if taken in the aggregate, these comments did not affect the outcome of Baer's trial," and were therefore not prejudicial under *Strickland*, *id.* at 142a.

The Seventh Circuit "acknowledge[d] that this is not a case where the defendant is sympathetic or a case where the defendant's guilt is uncertain," factors it said made "finding prejudice less intuitive." *Baer III*, App. 38a. It nevertheless held that this "less intuitive" conclusion was so obvious that the Indiana Supreme Court "was unreasonable to determine otherwise." *Id.* at 39a.

This is plainly not the deference demanded by AEDPA. As the Court has explained many times, an "unreasonable application of . . . clearly established federal law," 28 U.S.C. § 2254(d), is one that rejects a conclusion with which no "fairminded jurists could disagree," *Sexton*, 138 S.Ct. at 2558 (quoting *Harrington v. Richter*, 562 U.S. 86, 102 (2011)). The Seventh Circuit failed to explain why every fairminded jurist would be compelled to accept its—concededly counter-intuitive—conclusion.

The Indiana Supreme Court possessed significant leeway under *Strickland* to rule as it did. A showing of prejudice requires that but for the counsel's conduct there is a "substantial" likelihood of a different result. *Harrington*, 562 U.S. at 112. Nothing in the record demonstrates that had the jury heard more objections

from the defense it would have imposed a different sentence for Baer's unprovoked murder of a young mother and her four-year-old daughter. There is certainly nothing in the record taking such a prediction beyond the realm of fairminded disagreement.

The Seventh Circuit's reasoning consists of nothing more than an unfounded assertion that it calculated a greater probability that "without the prosecutor's injection of impermissible statements and incorrect law the jurors would not have recommended death." *Baer III*, App. 39a. And evaluating the probability of a different result in a counterfactual trial is precisely the sort of situation "involv[ing] a *Strickland* claim . . . that turns on general, fact-driven standards" where "deference to the state court should have been near its apex." *Sexton*, 138 S. Ct. at 2560. But rather than according the Indiana Supreme Court this deference, the Seventh Circuit reviewed Baer's claim *de novo*.

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The Court has "'often emphasized that '[AEDPA's] standard is difficult to meet' 'because it was meant to be.'" *Sexton*, 138 S.Ct. at 2558, 2560 (quoting *Harrington*, 562 U.S. at 102). Here, however, the Seventh Circuit dismissed the Indiana Supreme Court's authoritative interpretations of state law, discarded the state court's correct application of federal law, and—most notably—flouted AEDPA's "highly deferential standard for evaluating state-court rulings." *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011) (internal quotation marks omitted). Its decision should be reversed.

CONCLUSION

The Court should grant the petition, reverse the judgement below, and reinstate Baer's death sentence.

Respectfully submitted,

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